

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 312 of 1981

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

FATMABIBI W/D ABDULKARIM HAJI KADARBHAI

Versus

ABDULREHMAN ABDULKARIM DECEASED THROUGH HIS LEGAL HEIRS

Appearance:

MR SB VAKIL for Petitioner

MR GR PATHAK for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 27/04/2000

ORAL JUDGEMENT

#. This is plaintiff's first appeal against the judgment and decree dated 30th June, 1980 of City Civil Court at Ahmedabad dismissing the suit of the plaintiff for recovery of possession of the demised property from the defendants as well as for recovery of mesne profits.

#. The brief facts giving rise to this appeal are as under.

#. The disputed property bearing Survey No. 3912 was owned by the appellant's husband who was the sole owner of the same. The husband of the appellant arranged for marriage of the defendants. They are step sons of the appellant's - plaintiff's husband. After marriage, defendant No.1 started quarreling, hence, they were asked to live separately in the same house in separate portion on licence basis. Thereafter, on 20-4-1973, the husband of the appellant made oral gift of the entire property in favour of the appellant. A registered declaration was made in that connection on 10-5-1973. From the date of registration of declaration, the plaintiff claimed to be absolute owner of the suit property. The husband of the appellant plaintiff expired on 15th March, 1975. On account of constant quarreling amongst the defendants, it was inconvenient for the appellant to stay in the house, consequently, notice was given to the defendants to vacate the premises but with no result. Licence was revoked through registered notice. But again possession was not delivered. On the other hand, false reply to the notice was given on 12-2-1975. The reply notice was also replied by the plaintiff appellant. Ultimately, the appellant had to move application under Section 41 of the Presidency Small Causes Court Act for recovery of possession from the defendants. The said suit was dismissed with observation that the plaintiff may move appropriate court in the matter. Since licence was revoked and the defendants respondents did not hand over possession of the portion in their occupation, hence, suit was filed for recovery of possession of disputed portion from the defendants respondents. Prayer was also made for a decree for mesne profit at the rate of Rs.20/per month with effect from 17-1-1975.

#. The suit was resisted by defendant No.1 on various grounds viz. that the court fee paid was insufficient that the suit is bad for non joinder of necessary parties viz. the sisters of all the defendants. It was denied that the defendants were residing in the disputed premises as licensees from their father. On the other hand, they pleaded that they are residing in their own right as owner of the property. The oral gift in favour of the plaintiff appellant was also denied by them, so also the registered declaration. The plaintiff's absolute ownership in the property was disputed by them. The validity of the gift was challenged on the ground that it was not made in presence of anybody nor

possession of the property was handed over to the plaintiff appellant. They also pleaded that since they are residing in the suit premises in their own right since last 30 years, the plaintiff has no right either to recover possession or to recover mesne profits.

#. On the pleadings of the parties, the trial court framed seven issues. The findings of the trial court are that the plaintiff is not the owner of the suit property. It further found that the plaintiff failed to establish that she became the owner of the suit property under a valid gift made in her favour by her deceased husband. On the point of licence, the finding of the trial court is that the defendants were licensees in the suit property from the husband of the plaintiff appellant and thereafter, as licensees from the plaintiff appellant and that the licence was validly revoked. The trial court further found that the plaintiff is not entitled to mesne profits claimed by her. The plea of the defendants regarding non joinder of necessary parties was repelled by the trial court. The trial court further found that the suit was properly valued and the court fee paid was sufficient. With these findings, the suit was dismissed for recovery of possession as well as for recovery of mesne profits, hence this appeal.

#. None appeared from the side of the defendants respondents despite revision of list four times. As such, Mr.M.B. Gandhi, learned counsel of the appellant was heard and the judgment under appeal was examined. Shri Gandhi has laid emphasis upon the findings of the court below on Issue No. 2. On other issues, the findings of the trial court have not been assailed except that the findings regarding the plaintiff's ownership recorded by the trial court are incorrect and contrary to law. In this way, the findings of the trial court on Issues No. 1 & 2 are actually under challenge.

#. The learned trial court while deciding Issue No.2 found from the evidence on record especially the documentary evidence Exh.31 that one of the essentials of valid gift under Mahomedan Law regarding declaration from the owner is satisfied. It would be necessary to recapitulate that there are three essentials for a valid gift under the Mahomedan Law.

#. Section 149 of Mulla's principles of Mahomedan Law, 19th Edition lays down that it is essential to the validity of a gift that there should be (1) a declaration of gift by the donor, (2) an acceptance of the gift, express or implied, by or on behalf of the donee, and (3)

delivery of possession of the subject of the gift by the donor to the donee as mentioned in Section 150. If these conditions are complied with, the gift is complete.

#. Out of all these three ingredients, the trial court found that only one ingredient for a valid gift was established by the plaintiff viz. there was declaration of gift by the donor in favour of the donee. Regarding other two conditions, the trial court found that delivery of possession was not proved nor acceptance of gift by the donee was established. Consequently, oral gift in the opinion of the trial court was incomplete and invalid. This finding of the trial has been challenged by Mr. Gandhi. His contention has been that so far as delivery of possession is concerned, the trial court has neither considered the principles of Mahomedan Law nor the evidence on record. He has rightly placed reliance on Section 150 of the Principles of Mahomedan Law (Supra), which lays down that it is essential to the validity of a gift that there should be a delivery of such possession as the subject of the gift is susceptible of. Section 152 of the Principles of Mahomedan Law further lays down in what manner delivery of possession of immovable property is to be established. Sub Section (3) of Section 152 deals with case where donor and donee both reside in the property. It further lays down that no physical departure or formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing at the time of the gift. In such a case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift.

##. Section 153 is directly applicable in the instant case because the donor was the husband and the donee is the widow of the donor. It lays down that the rule laid down in Sec. 152(3) applies to gifts of immovable property by a wife to the husband and by husband to the wife, whether the property is used by them for their joint residence or is let out to tenants. The fact that the husband continues to live in the house or to receive the rents after the date of the gift will not invalidate the gift, the presumption in such a case being that the rents are collected by the husband on behalf of the wife and not on his own account.

##. From joint reading of the aforesaid Sections 152(3) and 153, it is clear that formal delivery of possession is not necessary where the oral gift was made by the husband in favour of the wife and both were jointly

residing in the house at the time of declaration and creation of oral gift.

##. The trial court after referring Section 152(3) made observation that there is nothing on record to show that the deed of declaration Exh.31 was handed over to the plaintiff appellant by her deceased husband. The rent receipts, according to the trial court, were also not produced. Mutation was affected in favour of the plaintiff appellant. For that, the trial court found that since this was done at the instance of the husband of the plaintiff - appellant, it had no consequence on the point of delivery of possession. In the opinion of the trial court, since mutation was affected after creation of oral gift, it will be deemed that the husband acted on his wife's behalf and not on his own. Further according to the trial court, mutation in record will not satisfy the third ingredient as to delivery of possession. No rent receipt was handed over nor it was filed before the trial court. These reasonings are untenable. The deed of declaration Exh.31 was not properly read and appreciated by the trial Court. No doubt oral gift was created on 20th April, 1973 and this deed of declaration was executed on 10th May, 1973 but this fact alone is not sufficient for drawing inference that the deed of declaration of oral gift was suspicious or it was the result of legal brain as has been observed by the trial court. All necessary details are given in the deed of declaration. Reasons for delayed written deed have also been given in Exh.31, wherein it is clearly mentioned that the above oral gift has been done on 20th April, 1973 in presence of two persons but as there is no written declaration for the same, I hereby declare the same as per this declaration. The observation of the trial court that the declaration was not made in presence of any person, is contradicted from specific recital on the point in the deed that the gift was done in presence of two persons. Deed of declaration of oral gift was prepared on 20th April, 1973 in presence of two persons. Non examination of these two persons would not be sufficient ground for drawing adverse inference against the plaintiff. After all, the deed of declaration was got registered and it could not be established by the defendant No.1 through any satisfactory evidence that the deed Exh.31 is a sham document.

##. In this very deed, it is mentioned that the donor had given application on 10th May, 1973 for transferring the property in the name of his wife in City Survey and Municipal Corporation. On the basis of this application,

requisite entry was made in the property register card Exh.18, wherein there is mention of oral gift and the name of the new holder, viz. the plaintiff appellant, has been mentioned in the property register card. Under these circumstances, this aspect was wrongly ignored by the trial court. If the mutation was made in favour of the appellant, may be on subsequent application of the donor, such mutation will indicate primarily that the holder was in possession of the property. It also indicates that the holder was owner of the property. The entry in the property register card may not be conclusive evidence of ownership in the property but it is conclusive evidence regarding possession of the person in whose favour entry had been made. On almost identical facts in the case of S.M.S. SALEEM HASHUNI V. SYED ABDUL FATEH reported in AIR 1972 PATNA 279, the facts were that papers were handed over and the donor consented to record the name of the donee in the municipal record. It was held that the condition about delivery of possession was satisfied. Here in the case before me, application for mutation was moved by the donor himself. Consequently, his consent for mutation entry will be presumed and if the mutation was made without any objection from any other person, such mutation entry can be pressed into service for holding that the holder was in actual possession of the property. Since the donor and donee were residing in the house together, it was not necessary for the donor to depart from the house but some overt act showing that the donor has divested himself of the property is required to be proved. That has been established from the evidence on record which was ignored by the trial court.

##. In the plaint, it is mentioned that the defendants were occupying the property as licensees from her husband and thereafter as her licensees. It was further mentioned in para 2 of the plaint that on account of constant quarreling, licence was revoked and notice was given but with no result. Ultimately, application under Section 41 of the Presidency Small Causes Court Act was filed against the defendants in the Small Causes Court, Ahmedabad. There also plea of licence was referred to. No doubt the said application under Section 41 was dismissed but the question whether it was licence or occupation as owner was left open for adjudication by the competent court. Dismissal of said application under Section 41 could not be ground for holding that the oral gift has been rendered invalid or that the defendants were held to be owners of the property occupied by them to the exclusion of the plaintiff. The fact that the application under Section 41 was filed by the appellant

against the respondents, will indicate that exclusive possession of the plaintiff appellant was alleged and the defendants were alleged to be licensees. Thus, this is an overt act regarding delivery of possession to the plaintiff by her husband.

##. There is also unequivocal declaration and recital in the deed of declaration Exh.31 that the donee is the sole owner and occupier of the said property and is using the same. It is further mentioned in the deed of declaration that there was no right, title or interest of anyone on the said property and as donor himself had given in gift the said property to his wife clear in all respects, same has been handed over to her in her actual possession as stated above and from the said deed, possession and occupation of the said property is with the wife of the donor. These clear recitals proved necessary ingredients regarding delivery of possession of the gifted property to the donee.

##. In view of the above discussion, I am unable to agree with the trial court that the second ingredient regarding delivery of possession is not proved, on the other hand, it is proved from the cogent documentary evidence on record that the donor had delivered possession of the property to the donee.

##. Regarding acceptance of gift, I am again unable to agree with the findings of the trial court. The trial court has observed that so far as the oral evidence is concerned, not a single word is there to show that the plaintiff accepted the gift. None of the witnesses has deposed that the plaintiff has accepted the gift. There is mention in the deed of declaration Exh. 31 that the plaintiff had accepted the gift. This deed of declaration was executed by the donor himself. If the donor admitted that donee had accepted the gift, keeping in view the relationship between the donor and donee, no further evidence was required to prove acceptance of gift by the donee. The trial court raised suspicions regarding the declaration on the ground that it appears that it must be the result of consultation with some legal brain. However, for this inference drawn by the trial court, there is no material on record that the deed of declaration was prepared in consultation with some legal brain. Even if it was so prepared in consultation with legal brain, it cannot be said that it was collusive transaction. The trial court was also suspicious from the evidence that because there was some indication in evidence that the husband approached with some papers for registration and mutation, the deed of declaration is

suspicious document. This reasoning of the trial court is also not acceptable. The deed of declaration was got registered and unnecessary suspicion regarding such registered document should not have been raised by the trial court.

##. In the result, I find that the third ingredient viz. acceptance of oral gift by the donee is also found proved. Consequently, all the three ingredients for valid gift under the Mahomedan Law were established by the plaintiff appellant and the trial court, to my mind, was apparently in error in disbelieving the oral gift. The suit in these circumstances was wrongly dismissed by the trial court. The suit for recovery of possession should have been decreed by the trial court.

##. So far as the claim for mesne profits is concerned, claim at the rate of Rs.20/- per month does not appear to exorbitant nor there is any evidence to show that this claim is exorbitant.

##. The appeal has therefore to be allowed and is hereby allowed with costs through out. The judgment and decree of the trial court are set aside. The suit of the plaintiff appellant for possession of the disputed portion from the defendants is decreed. The appellant also shall get decree for Rs.460/- being mesne profits from 1-2-75 to 31-12-76 at the rate of Rs.20/- per month. The appellant shall also get pendent lite and future mesne profits at the rate of Rs.20/- per month with effect from 1-1-1977 till actual delivery of possession from the defendants.

Date : 27-4-2000 [D.C.Srivastava, J.]

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